Roney Plaza Management Corp. *and* Hotel, Motel, Restaurant and Hi-Rise Employees and Bartenders Union, Local 355, AFL–CIO. Cases 12–CA–14624 and 12–RC–7438

February 12, 1993

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On August 5, 1992, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order, except as modified below.

The judge found, among other things, that the Respondent unlawfully threatened employees with a loss of benefits should they select the Union to represent them. The Respondent excepted to this finding. For reasons that follow, we find merit in the Respondent's exception.

During the summer of 1991, Hotel, Motel, Restaurant and Hi-Rise Employees and Bartenders Union, Local 355, AFL–CIO attempted to organize the Respondent's housekeeping employees. In response to the Union's campaign and to convey its message, the Respondent held small group meetings (with about 5–10 employees) as well as a large group meeting (with a majority of its approximately 90 employees in attendance). During these meetings, as found and fully discussed by the judge, the Respondent, through Assistant General Manager Hernandez, made statements that violated Section 8(a)(1) of the Act. We agree with all the judge's findings except that relating to the complaint allegation alleging a threat of a loss of benefits.

In this regard, according to the credited testimony, at the large group meeting Hernandez told employees that, if the Union won the election, ''the Union would not permit for [employees'] bags of provisions of food . . . to be taken out.''

Contrary to the judge, we cannot find that Hernandez' statement violated Section 8(a)(1) of the Act. The remark was ambiguous. This is particularly true here because the General Counsel failed to establish that the employees—at the time the statement was made—enjoyed any food benefits. Thus, it is difficult to conclude that the Respondent threatened the loss of any existing benefit. Further, the Respondent did not state that it would take away any benefit. Rather, it alleged that the Union would not permit some sort of bags of food to be taken out. In light of these factors, we cannot find that the General Counsel established that the Respondent, through Hernandez' remark, threatened its employees with a loss of benefits for selecting the Union to represent them.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Roney Plaza Management Corp., Miami Beach, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Interrogating employees concerning their union activities and sentiments; threatening, either expressly or impliedly, that the Respondent might close its facility if employees select the Union as their collective-bargaining representative; conveying to employees the impression that their union activities are under surveillance; and conveying to employees that it would be futile for them to select the Union as their collective-bargaining representative.''

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the election in Case 12–RC–7438 be set aside and that the case is severed and remanded to the Regional Director for Region 12 to conduct a new election whenever he deems it appropriate.[2]

[Direction of Second Election omitted from publication.]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Having adopted the judge's findings, except that regarding the alleged threat of loss of benefits, we sustain union Objections 1(a), (c), and 2.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees concerning their union activities and sentiments; threaten, either expressly or impliedly, that we might close our facility if employees select the Union as their collective-bargaining representative; convey to employees the impression that their union activities are under surveillance; or convey to employees that it would be futile for them to select the Union as their collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

RONEY PLAZA MANAGEMENT CORP.

George S. Aude, Esq., for the General Counsel.
Susan Potter Norton, Esq. and *Peter L. Sampo, Esq. (Hogg, Allen, Norton and Blue, P.A.)*, of Coral Gables, Florida, for the Respondent/Employer.
Andres Rivera-Ortiz, Esq. (Kaplan & Bloom), of Miami, Florida, for the Union.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case in Miami, Florida, on January 13 and 14, 1992. Pursuant to a Decision and Direction of Election issued on August 18, 1991,[1] an election by secret ballot was conducted on August 16 among the employees of Respondent in a bargaining unit found appropriate and described as:

> All full time and regular part-time housekeeping employees including laundry employees, maids, housemen, and porters; maintenance employees; painters; coffee shop employees including kitchen employees and cashiers; grounds keeping employees; and pool employees employed by the employer at its Miami Beach, Florida facility; excluding front desk employees, sales employees, office clericals, guards and supervisors as defined in the Act.

A majority of the votes cast were against being represented for purposes of collective bargaining by Hotel, Motel, Restaurant and Hi-Rise Employees and Bartenders Union, Local 355, AFL–CIO (the Union). Following the election, the Union filed timely objections on August 22. Following an investigation of these objections by the Regional Director for Region 12 of the Board, the Union withdrew certain objections, and the Regional Director ordered that a hearing be held to resolve the remaining objections.

The charge in Case 12–CA–14624 was filed by the Union on August 14 and thereafter amended on August 23 and October 17. A complaint and notice of hearing issued therein on October 23 which alleges, inter alia, that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating employees about their union membership and activities, by creating the impression that employees' union activities were under surveillance, by threatening closure of the facility and loss of free meal benefits if the union was elected, by conveying to employees that it would be futile to select the Union as their collective-bargaining representative, and by threatening employees with bodily harm in retaliation for union activities.

On December 2, the Regional Director issued an order consolidating for hearing the unfair labor practice issues and the issues presented by the Union's objections to the election.

In its answer to the complaint, Respondent admitted certain allegations including the filing and serving of the charge; its status as an employer within the meaning of the Act; the status of Hotel, Motel, Restaurant and Hi-Rise Employees and Bartenders Union, Local 355, AFL–CIO as a labor organization within the meaning of the Act; and the status of certain individuals as supervisors and agents of Respondent within the meaning of Section 2(11) of the Act. Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial herein, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, counsel for the General Counsel and Respondent both filed timely briefs with me which have been duly considered.

On the entire record in this case and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Roney Plaza Management Corp. is a Florida corporation engaged in leasing apartments, office, and retail space, and operating a hotel at its facility in Miami Beach, Florida. In the course and conduct of its business operations, Respondent annually derives gross revenues in excess of $500,000 and purchases and receives at its Miami Beach, Florida facility goods and materials valued in excess of $5000 directly from sources located outside the State of Florida.

Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

Hotel, Motel, Restaurant and Hi-Rise Employees and Bartenders Union, Local 355, AFL–CIO is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates herein refer to 1991 unless otherwise specified.

III. THE UNFAIR LABOR PRACTICES AND OBJECTIONS TO THE ELECTION

A. *Background*

Respondent operates a large facility in Miami Beach, Florida, consisting of approximately 1300 units. This includes 826 apartment rentals, 338 hotel units, 50 retail units, and approximately 50 office units. The retail units are located primarily in the store front and mall areas of the complex, while leased office space is located mainly on the mezzanine floor. Upper floors are devoted to the hotel and apartments.

Approximately 90 employees, who primarily perform manual and physical service, are employed in the bargaining unit found appropriate. Respondent's management hierarchy is divided amongst six departments, including the front desk, housekeeping, laundry, painting, maintenance, and restaurant. Above department supervisors are the assistant general manager, executive resident manager, executive manager, and general manager.

B. *July 31 to August 9: Small Group Meetings*

Prior to the Board-conducted election held on August 16, Respondent held several closed-door meetings with small groups of employees in its social hall between July 31 and August 9. These meetings were conducted by Executive Resident Manager Michael Basanta and Assistant General Manager Carlos Hernandez, and each was attended by approximately 5 to 10 employees.

Employee Maximo Castro, who has worked for Respondent for approximately 8 years, testified about the meeting he attended on or about July 31 with four other employees. The meeting began by Assistant General Manager Hernandez stating the reason for the meeting was to inform employees there was going to be an election regarding the Union. Castro then testified:

> and then he asked, who had signed the card of the Union. The people who were there we denied it, and then he told us not to deny it because he knew that the majority of us signed that card.

Castro testified credibly that Hernandez then asked if employees had received a letter from the Union. Some of the employees denied it, but after a few moments of silence, Castro admitted receiving a letter from the Union. Castro testified that Hernandez told the employees that ''we knew that the Union could not be beneficial to us. . . . If the Union won the election, that management would not accept us.''

Employee Armando Pina, who as of the trial herein had worked for Respondent as a porter for approximately 16 months, testified concerning the small group meeting he attended with four other employees in the social hall on August 9. Pina, like Castro, testified that during this meeting Hernandez asked employees ''whether we had signed a certain card.'' Pina testified that none of the employees admitted having signed a card. Pina testified, ''At no moment did we say that we had signed a card because if we said anything about signing that [card] they [management] could throw us out.'' According to Pina, Hernandez spoke about what would happen if employees selected the Union, and Hernandez stated, ''If the Union came in . . . the Company could close the Hotel.''

Respondent called Basanta, Hernandez, and employees Carlos Socarras and Francesca Bravo to testify about these small group meetings. Basanta and Hernandez both denied that either interrogated employees or threatened that Respondent would or could close the facility if employees selected the Union. Both Basanta and Hernandez testified that they read from a prepared text at all of these small group meetings. The text of a speech prepared by Respondent's counsel was introduced into evidence. Basanta and Hernandez both claimed that they never deviated from the prepared text. Obviously the prepared speech does not include any interrogation of employees or threats to close the facility. Employee Maximo Castro testified that Hernandez spoke to the employees in Spanish without any papers in front of him. Pina was not asked whether Hernandez and/or Basanta read from prepared documents or spoke extemporaneously. From a composite of the testimony of all witnesses who testified concerning these small group meetings, I find that Hernandez was the primary speaker for Respondent. Basanta may have spoken to employees, but not to the extent that Hernandez did so.

I find that a speech had been prepared by Respondent's counsel in English and given to Hernandez and Basanta. Hernandez and Basanta, however, both spoke to employees in Spanish. According to both Hernandez and Basanta, they allegedly translated from English to Spanish while they were reading the prepared text. Basanta actually claimed they never deviated from the prepared text even when they were responding to employees' questions. I find these claims utterly incredible. Basanta and Hernandez admit that they made no effort beforehand to determine which of them would read which part of the prepared speech to employees. One would simply take over when the other appeared winded. It is simply too farfetched to believe that either of these individuals, much less both of them, could refer to a text in English and simultaneously translate into Spanish while addressing a group. The idea of always using a prepared text, and reading from it, even to answer employees' extemporaneous questions is even more preposterous. I find employee Maximo Castro is wrong when he testified that Hernandez did not have papers in front of him, but I find that these papers served merely as a guidepost for Hernandez' remarks to employees.

I found Maximo Castro and Armando Pina both to be very credible witnesses. I find that Hernandez made the remarks attributed to him by both of them. Employee Carlos Socarras, who was at the meeting attended by Castro, was called as a witness by Respondent, but a review of his testimony reflects that the small group meeting to which he testified on direct was not the same meeting described by Castro. On direct, Socarras described a small group meeting, and specifically denied that Hernandez interrogated employees or threatened to close the facility. Later in his testimony, however, it became apparent that the meeting which Socarras had described was not a meeting regarding the Union held in the social hall, but rather was some other small group meeting held in Hernandez' office where the Union was never mentioned. Hernandez himself admitted that none of the small group meetings concerning the Union were held in his office. It it therefore apparent that Socarras' testimony simply does not relate to the same meeting described by Castro.

The meeting attended and described by employee Francesca Bravo was not the meeting attended either by Castro or Pina. Accordingly, her testimony simply does not serve to rebut the credible testimony of Castro and Pina concerning remarks made by Hernandez at the meetings they attended. Basanta and Hernandez, the executive resident manager and assistant general manager, respectively, are obviously interested parties to this proceeding. Castro and Pina are both current employees who have nothing to gain by testifying against their Employer's interest. Both Castro and Pina impressed me as being straightforward credible witnesses, and I find that in the small group meetings they attended, Hernandez interrogated employees about their union activity and threatened, either expressly or impliedly, that Respondent might close the facility if the employees selected the Union. These meetings were held in Respondent's social hall, outside of the employees' normal work area. They were conducted by the executive resident manager and the assistant general manager of the entire facility. In the meeting attended by Castro, when Hernandez got no response to his inquire, he pursued the matter, telling employees not to deny having signed a union card because he knew that a majority of employees had signed such cards. Hernandez pressed the matter by asking if employees had received a letter from the Union. Only Castro reluctantly admitted receiving a letter. Other employees denied both signing a card or receiving a letter, while a number of employees simply remained silent. The circumstances of this interrogation reflect both a coercive atmosphere and a coercive nature to the interrogation itself. I find that Hernandez' interrogation and threats violated Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). I also find Hernandez' remark that employees should not deny having signed a card because he knew that a majority had done so gave employees an impression that their union activities were under surveillance. This remark also violated Section 8(a)(1) of the Act.[2]

C. *August 14: The Large Group Meeting*

On August 14, 2 days prior to the Board-conducted election, Respondent held a large group meeting with the majority of its employees in the social hall. Employee Maximo Castro testified he attended this meeting along with 60 or 70 other employees. Assistant General Manager Hernandez and Executive Resident Manager Basanta conducted this meeting, as they did the small group meetings. All witnesses agree that the meeting began by Hernandez distributing certain papers to employees and keeping some. Castro testified that Hernandez addressed employees, and that four or five times while doing so, Hernandez looked down at his papers, read certain things, then put his glasses back on top of his head and continued talking to employees about the Union with his glasses off. Castro testified Hernandez told employees that those for the Union should raise their hands. No one did so. Hernandez then told employees that whoever was for the Company should raise their hands. Castro testified credibly that six or seven people raised their hand. According to Castro, Hernandez also told employees that if they did not want the Union, they should go to the Union and say they did not want an election. Castro then testified that Hernandez said:

> If the Union won, that we should realize that the Company could close the hotel down, and so, he told us also, that they would closed down the Company, and that was not to our advantage, if management did not accept what the Union told him, the Union had no force to do . . . anything.

On cross-examination, Respondent's counsel at one point illicited what appeared to be an admission from Castro that his testimony was actually his own interpretation of certain statements contained in a prepared speech used by Hernandez which referred to the fact that certain other specific hotels closed after becoming unionized. I then asked Castro, through the Spanish-language interpreter, whether Castro interpreted or concluded that, by reference to other hotels, Hernandez was suggesting that Roney Plaza would close or whether Hernandez specifically stated in his remarks to employees that if the Union was elected, Roney Plaza would close. Castro responded in a most credible manner:

> Mr. Carlos Hernandez told us that Eastern has failed, the hotel in Ft. Lauderdale, the hotel failed with the Union at the Holiday Inn, and other hotels, that I don't remember, *and then he said, if the Union is successful here, we, the management, can close down the hotel. We can have the hotel closed, that's all.* [Emphasis added.]

Respondent argues that during his testimony, Castro ''changed his story.'' I reject this argument altogether. In using a Spanish-language interpreter, it was apparent to me certain questions were not understood by the witnesses in the same manner which they might have been understood by another lawyer also speaking English. This was apparent both from observing the question as posed by counsel, the demeanor and mannerisms of the interpreter, the demeanor, mannerisms, and frequent hesitation of the witness, and the form and content of the answers as framed by the interpreter. That is precisely why I asked the interpreter to clarify the point with Castro. Castro never ''changed his story,'' as Respondent argues, but rather removed any confusion caused by counsel's question, either in form or content. Castro was a particularly credible witness, and Respondent's attempt to shed Castro in any other light is rejected. Armando Pina corroborates Castro concerning both the polling of the employees and the threat to close. Pina testified that in his remarks to employees, Assistant General Manager Hernandez stated that those who were in favor of the Union should raise their hands. After a moment, Hernandez then said that people who were in favor of the Company should raise their hands. In a somewhat disjointed but nevertheless still meaningful translation, Pina testified that Hernandez said, ''The Union could not enter into that Company because the Company could close down the hotel.'' It is clear Pina was testifying Hernandez stated that the Union could not force Respondent into a

[2] The fact that Hernandez and Basanta met with Respondent's counsel and received some instruction regarding what supervisors could and could not say in connection with a union organizing campaign is simply not prohibitive of what supervisors actually said to employees. Supervisors may have understood or misunderstood such instructions, or they may have complied with or totally ignored such instructions. The fact that they received such instructions from counsel is simply not prohibitive to what they said to employees.

bargaining relationship because Respondent could close down the hotel.

Laundry employee Marta Hernandez, no relation to Assistant General Manager Hernandez, also testified about this meeting. According to Marta Hernandez, Assistant General Manager Hernandez had some papers while he addressed employees which he would refer to from time to time to extract data or information. Marta Hernandez testified credibly, and I find accurately, that Carlos Hernandez did not simply read from a prepared speech. Marta Hernandez testified that during his remarks to employees, Assistant General Manager Hernandez told employees who were going to vote for the Union to raise their hands. No one did so. Hernandez then told the assembled group that employees who were going to vote for the Company should raise their hands. Marta Hernandez testified credibly that she saw between four and six people raise their hands in response to this last request. Marta Hernandez neither confirmed nor contradicted the testimony of other witnesses concerning Assistant General Manager Hernandez' threat to close the facility. On this point, Hernandez neither strengthens nor weakens the testimony of other witnesses.

Employee Cecilia Ramos, however, does corroborate the testimony of both Castro and Pina concerning the threat to close. Ramos, like Castro, Pina, and Marta Hernandez, testified credibly that as Assistant General Manager Hernandez addressed employees, he looked at papers in front of him from time to time, but he did not simply read from these papers. Ramos testified Hernandez told employees, ''If the Union won, the hotel would close . . . if the Union won, 10 years would go by to come to contracts and negotiation . . . .'' According to Ramos, Assistant General Manager Hernandez also told employees, ''If the Union won, that the Union would not permit for our bags for provisions of food . . . to be taken out.'' Last, Ramos corroborates the testimony of Castro, Pina, and Marta Hernandez concerning the polling of employees by Assistant General Manager Hernandez.

According to both Assistant General Manager Hernandez and Executive Resident Manager Basanta, handouts were passed out to employees in both English and Spanish versions, which they then read to employees verbatim. Both Hernandez and Basanta denied that either threatened to close the business if the Union won the election. Needless to say, no such remark is contained in the prepared speech. Neither Hernandez nor Basanta was able, however, to identify which portion of the prepared speech was read by which of them. According to Basanta, they did not preplan who was going to read which portion, but one would simply take over when the other ''ran out of gas.''

Although Hernandez and Basanta both claimed that they read the prepared speech verbatim, both also admit that Hernandez departed from the prepared speech in one very significant respect. They admit that Hernandez polled employees as testified to by Castro, Pina, Ramos, and Marta Hernandez. Assistant General Manager Hernandez admitted, ''I asked them whoever is with the Union, just raise your hand. Nobody did. . . . I said whoever is not with the Union raise your hand. Nobody did. . . . I said then what are we doing here. Let's go home.'' Hernandez testified that he was just joking when he suggested employees raise their hands. According to Hernandez, the mood was very tense in the room because the meeting was something unusual, and Hernandez did this to try to break the ice. Basanta also claimed that Hernandez was joking when he suggested employees raise their hands. According to Basanta, Hernandez often joked with employees, and Basanta volunteered that Hernandez never expected these comments regarding a show of hands to be interpreted as an actual polling of employees.

Respondent also called employees Carlos Socarras and Francesca Bravo to testify regarding this large group meeting. Socarras remembered Assistant General Manager Hernandez asking employees who supported the Union to raise their hands. He could not, however, recall Hernandez asking employees who were in favor of the Company to raise their hands. According to Socarras, it was evident, at least to him, that Hernandez was joking when he asked employees to raise their hands. Socarras also corroborates Hernandez that whoever conducted the meeting only read from papers in front of them and did not speak extemporaneously. Socarras, however, testified that Hernandez was the only one who spoke at this meeting, and not Basanta. Employee Francesca Bravo testified that when addressing employees, Hernandez would look at a piece of paper in his hand and speak at the same time, thus implying he simply read from a prepared speech. While Bravo denied Hernandez made any threat to close the hotel or suggested that it would be futile to select the Union, Bravo had a very poor memory regarding even certain fundamental events of that meeting. Bravo, for example, did not even remember Hernandez asking employees to raise their hands whether they were for or against the Union.

I do not credit Assistant Manager Hernandez, Executive Resident Manager Basanta, Socarras, or Bravo, that Respondent's representatives simply read a prepared text to employees at the large group meeting on August 14. Even Hernandez and Basanta admit that Hernandez deviated from the prepared speech in one very significant respect by polling employees to raise their hands rather they were for or against the Union. I found Castro, Pina, Ramos, and Marta Hernandez far more credible when they testified that Hernandez sometimes referred to papers in front of him but mostly spoke extemporaneously to employees. In its posthearing brief, Respondent argues that Hernandez' polling of employees should not be found to violate the Act ''insofar as it is apparent that Hernandez was not conducting a serious effort to discern employee positions on the union election.'' I would first observe it is not at all apparent Hernandez was not conducting a serious effort to discern employee positions. Polling of employees might be conducted in a most severe demeanor or in a demeanor conveying utter hilarity, but with the same result. Nor am I swayed by Hernandez' assertion that he was simply trying to break the ice. Hernandez himself admits that employees were very tense precisely because of the unusual nature of the meeting. Regardless of Hernandez' individual subjective intent, it is apparent objectively, and precisely because of the tension involved in that situation that many employees reasonably could have, and did, take Hernandez seriously. Even employees who were against the Union and for the Company took Hernandez seriously enough to raise their hands. I find that Hernandez unlawfully interrogated employees concerning their union sentiments by polling them as he did. *Conagra, Inc*., 248 NLRB 609 (1980).

I also credit employees Castro, Pina, and Ramos that Hernandez threatened possible closure of Respondent's facility if employees selected the Union. Obviously these remarks are not contained in the prepared speeches introduced by Respondent. I have found, however, that Hernandez simply referred to this prepared speech as a guidepost, and that many of his remarks were extemporaneous. Quite obviously Hernandez' remarks about the possibility of Respondent closing were made during those extemporaneous remarks. I find that Hernandez' threat that Respondent might close its facility if employees selected the Union violated Section 8(a)(1) of the Act.

I also credit Cecilia Ramos concerning two other remarks made by Hernandez during his comments to employees. First, I credit Ramos that Hernandez told employees that even if the Union won the election, 10 years would go by before negotiations for a contract could be reached. Second, I credit Ramos that Hernandez told employees if the union won, ''the Union would not permit for our bags for provisions of food . . . to be taken out . . . .'' In crediting Ramos, I am well aware of the fact that Ramos was the only witness to testify Hernandez made these specific statements. The recall of a witness, however, is often affected by the importance they attach to certain statements. Thus, the testimony of different witnesses to the same event is rarely identical. Ramos was the Union's observer at the election. One can assume, therefore, that she had even greater interest in Hernandez' remarks than Castro, Pina, or Marta Hernandez. While her heightened interest might adversely affect her credibility in certain circumstances, Ramos impressed me as a credible witness with a keen intellect. I credit her testimony, and I find that Hernandez' remarks concerning the time it might take to negotiate a contract amounted to Respondent informing employees it would be futile for them to select the Union as their collective-bargaining representative. Hernandez' remark concerning the Union not permitting employees bags for provisions of food is somewhat ambiguous and unclear. I agree with Respondent there is no showing that employees at present have free food or free meals. Be that as it may, what is clear is that Hernandez' was threatening, albeit somewhat ambiguously, some loss of benefits if employees selected the Union as their collective-bargaining representative. The fact that Hernandez stated the Union would not permit this, and thereby blamed the Union for this loss of benefit, does not vitiate Respondent. Threatening loss of benefits as a result of employees selecting a union violates Section 8(a)(1) of the Act regardless of where the blame is laid.

D. *August 14: The Conversation Between Michael Cometto and Maximo Castro*

Michael Cometto is a former partial owner of Roney Plaza who continues to lease certain space at the facility. Cometto's relationship with Respondent and the issue whether Cometto is an agent of Respondent is described and discussed in detail below. Cometto employees at least one office clerical who works in retail space leased by Cometto at the Roney Plaza facility.

Sometime during the union organizing campaign, employee Maximo Castro approached Cometto's office clerical employee to ask about her working relationship with Cometto and with Respondent in order to determine if she might be appropriately included in the bargaining unit being organized. Approximately 2 or 3 days before the election, Cometto had a discussion with Castro concerning why Castro had approached the office clerical employee and asked questions about her relationship with Cometto and with Respondent.

Castro testified that the conversation began while he was in Cometto's apartment shampooing a rug. Cometto approached Castro and asked Castro to go to Cometto's office later that day. Castro went to Cometto's office as requested. Castro testified Cometto stated in part, ''You have no reason to be in my office here asking about my employees.'' When Castro tried to explain, Cometto told him, ''Shut your mouth. Don't you know that I am an Italian Mafioso who could have you gotten out of the way.'' Cometto then wagged his finger in Castro's face saying, ''I'll break your face. . . . Get out of my office. I don't ever want to see you around my office again and much less my apartment.''

Cometto admits he met with Castro after Castro had visited Cometto's office in his absence asking about Cometto's office clerical employee who is covered by Respondent's health plan. Cometto admits he told Castro not to interfere with his business anymore and not to come to his office, but Cometto denied threatening Castro in any way.

As I have stated elsewhere above, Castro impressed me as being a very credible witness. While much of Cometto's testimony is credible, particularly that concerning his business relationship with Respondent, I do not credit Cometto's version of the conversation with Castro. Castro impressed me as being altogether credible regarding this conversation, and I find that Cometto did threaten Castro with physical harm as a result of Castro going to Cometto's office clerical employee and inquiring about her relationship both with Cometto and with Respondent. For reasons stated below, however, I find Cometto was not an agent of Respondent, and I therefore make no finding that Cometto's actions violated Section 8(a)(1) of the Act.

E. *Cometto's Relationship with Respondent*

From 1980 until December 1986 Michael Cometto owned 100 percent of a company known as Killington Corp. Killington owned 3 percent of Roney Plaza Limited which owns the land and building, and also manages the building. Cometto's ownership interest in Roney Plaza terminated in 1986, however, when he sold his entire interest in Killington. Cometto has no present interest in any of the beneficiary companies of the Roney Plaza Land Trust Agreement.

Since 1986 Cometto's relationship with Respondent has been limited to leasing a penthouse apartment, approximately 2000 square feet of office space, and a small warehouse area in Respondent's facility. There is no evidence that Cometto receives any discount in the rent paid for these areas from any other lease holder.

From the office and warehouse space, Cometto runs a business repairing and selling espresso coffeemakers and espresso coffee. Approximately every other month, Cometto receives a delivery truck carrying coffee and coffee machines. Because this happens so infrequently, Cometto does not have full-time employees available to unload these deliveries. Instead, he hires off-duty employees of Respondent to unload these trucks. While they are unloading the trucks, these employees are supervised by Cometto or a supervisor employed

by him, not by any of Respondent's supervisors. Cometto pays Respondent's off-duty employees directly either by cash or by check. Otherwise, Cometto's contact with Respondent's employees is limited to contact with them as a tenant in the building. Cometto's apartment is occasionally cleaned by Respondent's employees, and Cometto pays extra for this service.

There is really only one indication of any special relationship between Cometto and Respondent which might be different from any other tenant in the building. Cometto's office clerical employee is listed on Respondent's payroll as an employee of Respondent. The reason for this is undisputed. In fact, the individual performs no services for Respondent. She is carried on Respondent's payroll solely for insurance purposes so that she might be included in the group rate secured by Respondent. Thus, Cometto's office clerical employee receives her salary check from Respondent, and Cometto repays Respondent immediately.

Counsel for the General Counsel argues, and there is really no dispute about the fact, that many of Respondent's employees believe Cometto is one of Respondent's owners. Maximo Castro, Armando Pina, Eduardo Ramos, Cecilia Ramos, and Marta Hernandez all testified that they regarded Cometto as one of Respondent's owners. At least two of these employees, Eduardo Ramos and Cecilia Ramos testified that they were told by their respective supervisors Cometto is one of Respondent's owners. I do not find this testimony particularly significant, however, since in fact Cometto was indeed once a partial owner of Respondent. Even though employees incorrectly regard Cometto as one of Respondent's owners, the facts show that he has held no ownership interest in Respondent since 1986 and that his current contact with Respondent's employees is as a tenant in the building.

Based on all the above, I find that counsel for the General Counsel has failed to carry its burden of proof establishing Michael Cometto to be an agent of Respondent within the meaning of the Act. While one of Cometto's employees is carried on the payroll of Respondent, it is clear that she performs no work for Respondent and is carried on their payroll solely for insurance purposes. When supplies arrive for Cometto, he temporarily hires Respondent's off-duty employees. Such employees, however, are supervised by Cometto or by Cometto's own supervisor, not by Respondent's supervisor. Such employees are also paid directly by Cometto for such services. While various employees testified they regard Cometto as one of Respondent's owner, the facts show that he was indeed once but is no longer such a partial owner. Given his past partial ownership interest, it is probably true that Cometto still has some special informal relationship with Respondent, as evidenced by Respondent's willingness to carry one of Cometto's employees on its payroll. However, this fact alone is not sufficient to establish Cometto as an agent of Respondent. I find that counsel for the General Counsel has failed to establish Cometto as an agent of Respondent within the meaning of Section 2(13) of the Act. Accordingly, even though Cometto may have threatened employee Maximo Castro with physical harm for inquiring about the relationship between Cometto's office clerical employee and Respondent, I find that these acts are not attributable to Respondent and therefore do not violate Section 8(a)(1) of the Act. I shall dismiss that allegation from the complaint.

F. *August 16: Congregation of Supervisors During Election*

The Union has objected to conduct affecting the results of the election in part based on an alleged congregation of supervisors in or near the polling area. The only testimony on this matter came from employee Eduardo Ramos. Ramos testified that when he went into the social hall at Respondent's facility to vote, he saw management personnel standing behind the front desk opposite the social hall. Ramos testified that the front desk was approximately 25 feet from the entrance to the social hall. According to Ramos, he saw standing behind the front desk Executive Resident Manager Basanta, Assistant General Manager Hernandez, and Michael DeVeronica, all of whom are admitted supervisors of Respondent.

Ramos admits that these supervisors never walked out from behind the front desk or crossed the lobby to where employees were standing while preparing to go into the social hall to vote. Further, Ramos admits he did not observe the supervisors speak with any employees. Finally, Ramos conceded that these supervisors regularly appeared behind the front desk as a part of their normal duties, and that the front desk was near their offices.

Executive Resident Manager Basanta testified, and it is undisputed, that Respondent provided Regional Director for Region 12 of the Board a choice of three locations where the election might be conducted. Originally the Board indicated it would not hold the election in the social hall because it was too close to management offices. For whatever reasons, however, the Board's Regional Office eventually selected the social hall as the location of the election.

There is no showing that management interfered with employees approaching the polling place or conversed with employees as they waited to vote. In view of the fact that no communications were exchanged between the supervisors and voters, and the fact that the supervisors were in an area where they regularly worked at least 25 feet away from the entrance to the polling area, I find there has been no interference with the election based on this circumstance. Accordingly, I shall dismiss this objection.

G. *August 16: Presence of Respondent's Attorney in the Polling Place*

Next, the Union objects to conduct affecting the results of the election as a result of Respondent's attorney entering the polling place while the election was being conducted. The facts concerning this objection are largely undisputed.

At the preelection conference, the Union's attorney asked Respondent's attorney if there would be any problems with certain alleged discriminatees voting. The parties discussed this and agreed that the individuals, who no longer work for Respondent, would enter the building and voting place, vote and quickly depart.

While the election was in progress, Respondent's attorney was informed when one of the alleged discriminatees, Eduardo Ramos, came into the building and entered the polling place. Approximately 12 minutes later, Respondent's attorney was informed that Ramos was still in the voting area. Respondent's attorney then asked a nonbargaining unit, nonsupervisory employee to enter the polling place and asked Ramos to leave. The person did so. Thereafter, when Ramos

had been in the building approximately 18 to 20 minutes, Respondent's attorney entered the polling area and asked Ramos that he quickly vote and leave. At the time Respondent's attorney entered the polling area, there was only one other employee present, Freddie Martinez, who had already voted and was waiting to file his challenged ballot. Other employees were lined up just outside the polling area waiting to vote. Respondent's attorney did not speak to any of these employees. Finally, it is undisputed that Respondent's attorney who represented it at the election had not made any appearances before employees prior to this incident, had not handled the representation case hearing before the Board, and to his knowledge was totally unrecognized by employees except those employees who might have participated in the preelection conference.

I find that the brief appearance of Respondent's attorney in the polling area under these circumstances is not sufficient to warrant setting aside the election. The facts here strongly warrant an inference that, in all likelihood, no employees even recognized Respondent's attorney as an agent of Respondent. Respondent's attorney spoke to no one except Ramos, and said nothing to him except that he vote quickly and leave the premises. I find that this brief presence by Respondent's attorney in the polling area cannot reasonably be said to have had any impact whatsoever upon the untrammeled free choice of the voters in this matter. *Country Skillet Poultry Co*., 271 NLRB 847 (1984). Accordingly, I shall dismiss that objection to conduct affecting the results of the election.

H. *August 16: Supervisors Presence in the Polling Area*

Finally, the Union objects to conduct affecting the results of the election based on a supervisor appearing in the polling area while the election was being conducted. The testimony of employee Cecilia Ramos and Supervisor Juan Rodriguez conflicts substantially on this issue.

This much is undisputed. Employee Ramos, Supervisor Rodriguez, and several other employees all participate in some form of betting game in which a payout is made each Friday. The Board-conducted election was held on Friday, August 16, 1991. On that day, as a result of this regular betting game, employee Cecilia Ramos owed Supervisor Juan Rodriguez $20. While the election was in progress, Supervisor Rodriguez sent an employee into the polling area with a message for Ramos, the Union's observer, that he wanted her to pay him the money she owed him before he went home.

According to Ramos, after the message was delivered to her, and when she did not go and pay Rodriguez the money she owed him, Rodriguez opened the door to the social hall where the election was being conducted and signaled to Ramos in such a way that she knew he was requesting payment of the money she owed him. Ramos concedes that Supervisor Rodriguez did not say anything to her or anything to any other employees in or near the entrance to the social hall.

Rodriguez denies that he ever entered the social hall or even opened the door to that room where the election was being conducted. Rodriguez testified that sometime after he asked the employee to deliver the message to Ramos that he wanted Ramos to pay him the money she owed him, Ramos came out of the social hall to the security desk where Rodriguez was standing and paid him the money she owed.

Both Ramos and Rodriguez impressed me as credible witnesses, and I am convinced that both individuals believe they are telling the truth. I strongly suspect what happened was that when the employee Rodriguez sent with the message to Ramos came back without the money, Rodriguez did in fact go to the door of the social hall and signaled Ramos. I suspect too that Ramos then came out of the social hall, if only briefly, met Rodriguez at or near the security desk, and paid him the money she owed him. In other words, both Ramos and Rodriguez are telling a partial truth, and the whole truth lies somewhere in between. Even assuming, however, that Rodriguez did in fact go to the door of the social hall, open it, and signaled to Ramos, I find that this conduct did not interfere with the election. It is clear that even if Rodriguez came to the doorway of the social hall, he spoke to no one. Rodriguez did not even speak to Ramos, let alone other employees. Ramos obviously understood Rodriguez' signal immediately, and paid him the money she owed. I simply find this event too innocuous to cause the election to be overturned. Accordingly, I shall dismiss that objection to conduct affecting the results of the election.

CONCLUSIONS OF LAW

1. Respondent Roney Plaza Management Corp. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hotel, Motel, Restaurant and Hi-Rise Employees and Bartenders Union, Local 355, AFL–CIO is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. In small group meetings with employees, Respondent interrogated employees about their union activities and sentiments; threatened employees, either expressly or impliedly, that Respondent might close its facility if employees selected the Union; and conveyed to employees the impression that their union activities were under surveillance; and Respondent thereby violated Section 8(a)(1) of the Act.

4. In a large group meeting with all employees, Respondent polled employees and thereby interrogated employees concerning their union sentiments; threatened possible closure of Respondent's facility if employees selected the Union; conveyed to employees that it would be futile for them to select the Union as their collective-bargaining representative; and threatened employees with loss of benefits if employees selected the Union as their collective-bargaining representative; and Respondent thereby violated Section 8(a)(1) of the Act.

5. Michael Cometto was not an agent of Respondent and, therefore, although Cometto threatened employee Maximo Castro with physical harm for inquiring about the relationship between Cometto's office clerical employee and Respondent, these acts are not attributable to Respondent; and therefore Respondent did not thereby violate Section 8(a)(1) of the Act. That allegation is dismissed from the complaint.

6. The presence of supervisors at and behind the front desk at Respondent's facility during the Board-conducted election did not interfere with that election; and that objection to the election is therefore dismissed.

7. The momentary presence of a supervisor at the door to the polling area during the Board-conducted election was too

innocuous to interfere with that election; and that objection to the election is therefore dismissed.

8. The brief presence of Respondent's attorney in the polling place during the Board-conducted election, in the circumstances present here, is not sufficient to warrant setting aside the election; and that objection to the election is therefore dismissed.

9. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

While certain objections to the election are dismissed herein, the unfair labor practices which Respondent has been found to have engaged in occurred during the ''critical period'' prior to the election. Accordingly, it is hereby recommended that the election be set aside, and a new election be conducted by the Regional Director for Region 12 at a date, time, and place to be determined by him.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Roney Plaza Management Corp., Miami Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union activities and sentiments; threatening, either expressly or impliedly, that Respondent might close its facility if employees select the Union as their collective-bargaining representative; conveying to employees the impression that their union activities are under surveillance; conveying to employees that it would be futile for them to select the Union as their collective-bargaining representative; threatening, either expressly or impliedly, loss of benefits if employees select the Union as their collective-bargaining representative.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Miami Beach, Florida facility copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''